

---

---

## New Jersey Court of Errors and Appeals

Stille C. Chew, et al., part-  
ners, trading as Chew  
Brothers,

*Plaintiffs & Appellees,*  
vs.

Pennsylvania Railroad  
Company,

*Defendant & Appellant.*

On Appeal.

---

### BRIEF FOR PLAINTIFFS AND APPELLEES.

---

This suit involves the determination of the question as to liability of defendant for maintaining a bridge over Crosswicks Creek in this State, which is alleged by plaintiffs to be an obstruction to navigation.

The pleadings in this case were filed under the provisions of the rules of the "Practice Act (1912)," rule 17 thereof, providing that a statement of fact only is necessary, and that if any pleadings be insufficient, the Court may order a fuller or more particular statement. No objections were made to the

New Jersey State Library

pleadings in this case in the court below, except the one proposition, that it did not state that the bridge had been declared by the Secretary of War to be an unreasonable obstruction to the navigation of the creek.

While the appellant in its brief has attempted to justify their appeal, on allegation of defects in complaint, no such proposition was submitted to the Court below, and as we view it, this Court will not pass upon any question except such as were fully and fairly before the lower Court.

The state of the case in its final analysis, shows that the only question submitted to the Court below was whether or not the plaintiffs were precluded from recovering, because they failed to allege in their pleadings and substantiate by proof, that this bridge has been declared by the Secretary of War to be an "unreasonable obstruction" under the provisions of the River and Harbor Act passed by Congress and approved March 3, 1899.

This was the only question submitted to the Court.

The matters raised in brief of appellant, as to form of pleadings and matters of proof on the part of appellees at the trial, are not properly before this Court, as the trial Court understood after the colloquy (pages 24, 25 and 26 of the state of case) that the defendant admitted its liability unless such liability was negatived because of the Act of Congress hereinbefore referred to.

The Court had the right under the law to frame the issue, and the following extract from state of case from statement of Mr. Gaskill, shows conclusively that the issue was framed, leaving only one question to be determined, and that a legal one:

"It is not sufficient for him to state in his

complaint or in his opening that there is a bridge there and that that bridge was an unlawful obstruction; *he must prove it is an unreasonable obstruction by reason of the Secretary of War having so declared. Now, that is practically the situation as counsel has stated it.*

The Court: Then your defence is wholly——

Mr. Gaskill: Statutory.

The Court: That as a condition precedent to the maintenance of an action of this sort the Secretary of War must act?

Mr. Gaskill: Yes, sir.

The Court: Within the provisions of the statute which you read?

Mr. Gaskill: Yes, sir.

The Court: But I do not understand, you question the plaintiffs' contention, that this bridge across this navigable stream did obstruct navigation.

Mr. Gaskill: No, we don't question that; in other words, I agree with counsel in that this is a navigable river and that this bridge was an obstruction to some extent to navigation.

The Court: And it did obstruct these plaintiffs in the operation of their dredge so that they sustained damage to the extent of \$600?

Mr. Gaskill: Yes, sir.

The Court: All right. I think we understand the situation. Now, what do you want me to do, gentlemen?

Mr. Gaskill: Will you dispose of it this afternoon, or examine the statute?

The Court: I will dispose of it now, if you have no objection.

Mr. Gaskill: No, that is entirely satisfactory.

The Court: Gentlemen of the jury, you are required to return a verdict for the plaintiffs for \$600.

Mr. Gaskill: Will your Honor give me an exception to your charge and to the direction to find a verdict for the plaintiffs?

The Court: Yes."

There being an admission of liability unless prevented by the Act of Congress, we deem that the only question now before this Court.

However, we are quite confident that plaintiffs, under the admission and the law, would be entitled to recover, unless they are prevented by the Act of Congress.

This principle is clearly stated, we contend, in the decisions of the Court in this State.

A railroad company can only exercise any right given by the Legislature, in a reasonable manner. They have no right to obstruct navigation.

See *The Attorney General vs. Stevens, et al.*, 1 N. J. E. 369-384.

In the case now being heard, the stream was navigable generally by scows and dredges, and the bridge was more or less of an obstruction at all times. In the above case, which was an application for an injunction, and which was denied, the Court held:

"It appears that they intend to leave a safe and convenient passage for scows, which is the only kind of boat that navigates that part of the stream; and if they should not, the parties injured will have a complete and summary remedy."

The general principle of the rights of the public in navigable streams is stated in the case of *Anderson vs. Penna. R. R. Co.*, 76 N. J. L. 718-724, as follows:

“The general rule of conduct in such cases is very fully, and we think, accurately stated by Circuit Judge Jenkins in *Clement vs. Metropolitan Railway*, 123 Fed. Rep. 271, already cited. The following is the language of the opinion:

“A bridge spanning a navigable river is an obstruction to navigation tolerated because of necessity and convenience to commerce upon land. Such a structure must be so maintained and operated that navigation may not be impeded more than is absolutely necessary, the right of navigation being paramount. It is incumbent upon the owner that the bridge be so constructed that it may be readily opened to admit the passage of craft and maintained in a suitable condition therefor, &c., &c., &c.”

See also *Mehrhof Bros. Co. vs. D. L. & W. R. R. Co.*, 51 N. J. L. 56.

The appellant's brief contains a statement as to an Act of the Legislature in general terms permitting the construction of this bridge, and although there is nothing in the proof to this effect, we admit that this statement is true. There is nothing in this Act, however, which permits or assents to the obstruction of navigation such as usually operates on the stream which any of the bridges cross.

“Where authority is conferred in general terms, to build bridges without specifying

their character, one which obstructs navigation is unlawful.”

29 *Cyc.*, 313 and notes.

“A general power to construct a road and bridges between given termini, the natural and convenient route of which road would pass several navigable streams, authorizes the corporation to construct bridges over such navigable streams in a manner that will not destroy the navigation of them.”

See note and cases cited, 28 *Cyc.*, 312;

See also *Attorney General vs. Hudson R. R. Co.*, 9 N. J. E., 526;

*Eastern vs. New York, etc., R. Co.*, 24 N. J. E., 49;

*D. L. & W. R. R. Co. vs. Mehrhof Bros. Co.*, 53 N. J. L., 205.

The Legislature, so far as we are able to find, has never passed a law authorizing the obstruction of navigation.

It is true that in some instances they have authorized the obstruction to some extent, by drawbridges, and have provided that when necessary for repairs, draws may be kept closed for certain periods and under certain conditions.

See *Lister vs. Newark Plank Road Company*, 36 N. J. E., 477.

It was admitted at the trial that the creek in question is a navigable stream, and it is admitted in the brief that the bridge was erected under a law of the State which did not authorize or legalize an obstruction to navigation. This bridge obstructing navigation was an unlawful and illegal structure, and the

defendant is liable to plaintiff for any damages resulting therefrom.

In *Texarkana Railway Co. vs. Parsons*, 74 Fed., 408, Judge Caldwell, of the Circuit Court of Appeals, U. S. Eighth Circuit, held:

“Every citizen has a right to the free navigation of the public waters of the United States, and any interruption or obstruction of this free use of any kind of a structure is, *prima facie*, a nuisance. But the power of Congress to regulate commerce among the States comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States, and the railroads engaged in interstate commerce.

“It is equally well settled by the authorities we have cited that those who seek to justify the erection or maintenance of a bridge across a navigable river, which obstructs its navigation, upon the ground that Congress authorized its erection and maintenance, must show that it was constructed and is maintained in accordance with the requirements of the Act of Congress. The defendant does not seem to have offered any evidence to prove a compliance with any of the numerous requirements of the Act of Congress under authority of which it is claimed the bridge was built, and it was conceded on the trial that the bridge had not been constructed in accordance with the explicit requirements of the Act of Congress, in a material respect. Upon the state of the record, therefore, the Court would have been justified in telling the jury that the bridge was an illegal structure and that the defendant was liable to the plaintiff for any damages resulting therefrom.”

Even where a State Statute authorizes the erection of a bridge, it is no defense where it is an obstruction to navigation.

*Tinsman vs. Belvidere D. R. Co.*, 26 N. J. L., 148.

The burden of showing that the obstruction is not unlawful is on the defendant.

*Dixsey vs. Long Island R. R. Co.*, 35 Hun. N. Y. 362;

*P. R. Co. vs. Baltimore R. Co.*, 37 Fed. 129;  
See also *City of Georgetown vs. Canal Co.*,  
12 Peters, 97;

*Packet Co. vs. R. R. Co.*, 2 Fed. 285;

*R. R. Co. vs. Packet Co.*, 125 U. S. 260;

*Rutz vs. City of St. Louis*, 7 Fed. 438.

In *P. R. R. vs. Baltimore R. R. Co.*, 37 Fed. 129, it was insisted on behalf of the defendant that the Court must presume the bridge had been erected and maintained according to the statute authorizing its construction, and consequently that the bridge was a lawful structure. Judge Wallace, however, held:

“If the contention for the demurrer is sound, it would devolve upon plaintiff, whose right to the free navigation of public waters has been interrupted by an impediment which, *prima facie*, is a nuisance, to prove that the defendant acted under an assumed authority, but was not justified because his acts were outside of the limitations of his authority; in other words to negative facts by way of defense, which are peculiarly within the knowledge of defendant; it would be as reasonable to contend that the burden of proof is upon a plaintiff who has sued an officer for false

imprisonment for taking him in custody on the public highway, to show that the officer acted without process, or under void process, or without probable cause. The demurrer is overruled."

The following syllabus of cases taken from Vol. 59, First Series, L. R. A., page 66, seems to be in point, and may be of some assistance to the Court:

"That a bridge was constructed under authority of an Act of Congress does not render it a legal structure except so far as it conforms to the limitations of the Act. If the powers granted by the Act were exceeded, or were exercised in a manner different from that provided in the grant of authority, the grant will be no protection. *Missouri River Packet Co. vs. Hannibal & St. J. R. Co.*, 1 McCrary 281, 2 Fed. 285."

"A charter to a bridge company to erect a bridge over a navigable stream does not authorize it to create any obstruction to the navigation of the stream in constructing the bridge. *Terre Haute Drawbridge Co. vs. Halliday*, 4 Ind. 36."

"A bridge erected over a navigable stream under legislative authority must be so erected as to interfere no more with navigation than is reasonably necessary. *State vs. Freeport*, 43 Me. 198."

"A railroad company authorized to construct its road across a mill stream will not be allowed, in the absence of necessity, to construct its bridge so low as to interfere with the flow of the water or the passage of barges. *Manser vs. Northern & E. Counties R. Co.*, 2 Ry. & Canal Cas. 380, 5 Jur. 983."

“General authority in a railroad company ‘to build bridges’ does not confer power so to construct them, as either to destroy or interfere seriously with the navigation of a public stream; as in the absence of express provisions it will not be assumed that the Legislature authorized the construction of a permanent structure over one of its streams susceptible of use for navigation, which would seriously impede the enjoyment of that use. *Southern R. Co. vs. Ferguson*, 105 Tenn. 552, 59 S. W. 343.”

“It seems, that if a State has the power to grant to a railroad company the right to impede navigation by the construction of a bridge, the grant must be explicitly given, and it will not be implied simply because a navigable stream intervenes between terminal points of the chartered right of way of the railroad company. *Little Rock M. River & T. R. Co. vs. Brooks*, 39 Ark. 403, 43 Am. Rep. 277.”

“In an action against a bridge company by the owner of boats, for damages occasioned by the detention of his boats by an obstruction created by the bridge, also for the loss of a boat for the same cause, it is a question for the jury to determine whether such bridge created such an obstruction to navigation as to render the company liable for the damages occasioned thereby. *Terre Haute Drawbridge Co. vs. Halliday*, 4 Ind. 36.”

“If a public bridge in its original construction and its condition impedes the free navigation of a stream for rafting timber, for which purpose it has been used for many

years, that fact may be shown in defense of an indictment for the destruction of the bridge. *Owens vs. State*, 52 Ala. 400."

## II.

The only question, in our opinion, before this Court at this time, as we have hereinbefore stated, is as to whether or not the Act of Congress set out in full in state of case, so far deprives a resident of the State of New Jersey of his right given by nature to navigate navigable streams as to prevent the recovery in this case.

The Act of Congress cited is not a law restricting any of the rights of citizens to navigate navigable streams, but rather is an Act to enable them to navigate more freely, recognizing the fact that bridges may and do unlawfully obstruct navigation. It is of a remedial nature in favor of the plaintiff in this cause. It does not attempt to state directly or by inference that bridges obstructing navigation are lawful until the Secretary of War actually passes upon the reasonableness or unreasonableness of such structure. It provides a method for the removal of such bridges as may be declared by the Secretary of War to be unreasonable after an investigation, and imposes a penalty on the owner of the bridge for non-observance of the Secretary's order.

The Act of Congress quoted in no manner interferes with the right of the individual to bring his action against the obstructor of navigation for the private injury occasioned him, but is intended to give the Secretary of War further means and power to keep navigable waters unobstructed, by providing a way or means for the Government to proceed

against the wrongdoer by criminal action to enforce its orders. It does not provide that navigable streams may be obstructed, but the converse, *i. e.*, that if such obstruction be brought to the attention of the War Department, that department may also proceed in the manner indicated; it does not either by word or implication restrict the right of the individual to bring his suit for the injury; the actions are not inconsistent, nor do they in any way conflict, but leave the law as it has always been, with the exception of adding power to the War Department for the enforcement of its orders.

This principle is set forth in the following cases:

“The right of private persons to erect structures in a navigable water of the United States that is entirely within a State cannot be said to be complete and absolute without the concurrent or joint assent of both the general and State government. The Act of 1899 does not manifest any departure from the previous policy of the United States and does not take from States their rights or give them to the United States.”

See *Willamette vs. Hatch*, 125 U. S., 1;

*Montgomery vs. Portland*, 190 U. S., 89;

*Cummings vs. City of Chicago*, 188 U. S., 410.

In *Gring vs. Ives*, 222 U. S., 365, a writ of error was taken to the State Court of N. C. from the Supreme Court of U. S. on a question concerning this same Federal Act of 1899. The writ was refused and the Supreme Court of the United States held that the State Court had decided the question and that it had the right to do it and that the Act of 1899 did not destroy the State powers over navigable waters in their own territory.

In *Lake Shore & Michigan R. R. Co.*, 165 U. S., 365, the Court held:

“The provision of the Act of September 19, 1890, (which our Act of 1899, now in discussion, simply confirms), conferring upon the Secretary of War authority concerning bridges over navigable waterways, does not deprive the cities of authority to bridge such streams or to render lawful all bridges previously constructed without authority, but simply creates additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce.”

Page 369:

“To hold that the Act (1890) manifested an intention on the part of Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would, therefore, be the creation of a new statute by juridical construction. It follows, therefore, that even conceding *arguendo* that the words ‘navigable waters’ as used in the Act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the State of authority to grant power to bridge such streams OR TO RENDER LAWFUL ALL BRIDGES PREVIOUSLY BUILT without authority, but simply to create AN ADDITIONAL AND CUMULATIVE REMEDY TO PREVENT SUCH STRUCTURES, ALTHOUGH LAWFULLY AUTHORIZED, FROM INTERFERING WITH COMMERCE.”

In the *Margaret J. Sanford*, 203 Fed., page 331, the U. S. District Court for Virginia, in 1913, construed this particular Act of 1899. The Court said:

“The further suggestion is made that perhaps the State Law has been superseded by the passage of the Federal Legislation in question, (to wit, the Act of 1899). This view is not without force since ordinarily legislation by the Federal Government upon a subject within its control is deemed exclusive of other authority, and this is clearly a subject within the dominion of Federal Legislation. While this is the general rule, the language and scope of the national Act would largely determine its purpose, and the intent of the Congress in passing it, and whether it was really meant that all local legislation should be set aside. Other sections of the Act under discussion, March 3, 1899, *supra*, having to do directly with rivers and harbors, the establishment of harbor lines, the granting of permits by the Secretary of War to build out into the navigable waters of the United States, have been the subject of review by the Supreme Court, (*Cummings vs. Chicago*, 188 U. S., 410, 428, 430, 23 Sup. Court, 472, 47 L. Ed., 525; *Montgomery vs. Portland*, 190 U. S., 89, 23 Sup. Ct., 735, 47 L. Ed., 965); and the contention was there as here made, but the Court ruled that it was not the purpose of Congress to take away from the State the right to control its internal waterways, and that the true meaning of the Act was that both governments should act conjointly therein, and hence that the legislation was not exclusive of the power and authority of the local governments in the premises. See, on

this general subject, also, *Gilman vs. Philadelphia*, 70 U. S., (3 Wall), 713, 18 L. Ed., 96; *Pound vs. Turck*, 95 U. S., 459, 462, 24 L. Ed., 525; *Willamette Iron Bridge Company vs. Hatch*, 125 U. S., 1, 8 Sup. Ct., 811, 31 L. Ed., 629."

The jurisdiction over navigable streams within a State is exclusive in the State Legislature and courts, except so far as Congress may see fit to interfere for the regulation of commerce.

*Lister vs. Newark Plank Road Co.*, 35 N. J. E., 477;

*Caldwell vs. American Bridge Co.*, 113 U. S., 205;

*Chirley vs. Bowbley*, 152 U. S., 1;

*Gilman vs. Philadelphia*, 3 Wall, 713.

The fact that no action has been taken by the Secretary of War under the Act of Congress cited, leaves the entire controversy in this matter to be settled by the courts under the laws of the State of New Jersey.

*Egan vs. Hart*, 165 U. S., 168.

"*Corsicana Cotton Oil C. vs. Valley*, 14 Tex. Civ. App. 250, 36 S. W. 999, holding that in an action for damages for maintaining a nuisance in a city, evidence that the municipal authorities have not taken action for the abatement of the nuisance is immaterial on the issue as to whether the matters complained of constitute a nuisance." 29 *Cyc.* 1268.

"*Holbrook vs. Griffis*, 127 Iowa 525, 103 N. W., 497, holding that in an action to recover damages for a nuisance, a resolution passed by the city board of health declaring defendant's building in controversy a nuisance, was inadmissible." 29 *Cyc.* 1268.

The U. S. Statute does not in any way abridge the right of individuals to recover damages for injuries, but simply furnishes a mode of freeing navigable waters of obstructions.

*Cummings vs. Chicago*, 188 U. S., 410.

All of the cases cited in brief for appellant are prosecutions under the Act in question after the Secretary of War has taken action, and have no bearing on the facts in this case, where it appears that no action has been taken, and that the obstruction has neither been declared by the Secretary of War reasonable or unreasonable.

We have carefully searched the statutes and decisions for some authority for or against the proposition submitted by appellant, and have been unable to find anything consistent with the view of the appellant that the mere permissive Act of Congress, under which no action has been taken, can in any way interfere with the rights of the citizens to have their claims adjudicated in the State courts under the common law and the statute of the State in which such abridgment of their rights may be exercised.

The line of railroad on which this bridge is constructed, is not a line necessarily incident to interstate traffic, and therefore the decision in this case must be controlled by local State regulations.

It is doubtful, even if the Secretary of War has any jurisdiction over this bridge, because of the fact that this bridge was constructed under the authority of a State Law, and not under the Acts of Congress of December 17, 1872, or February 14, 1883. This contention seems to be upheld by the opinions of two United States Attorney Generals.

See U. S. Attorney Generals' Opinions, Vol. 25, page 195, and on page 212, it is held as follows:

“There can be no doubt that the authority conferred upon the Secretary of War by Section 18 of the Act of March 3, 1899, was intended to cover bridges constructed under the authority of Acts of Congress, since by preceding sections of the same Act, provision was made for the case of structures of that nature unauthorized by Congress. (Secs. 9, 10, 12.)”

See also, Opinion of Attorney General Griggs, in the *Bellaire Bridge* case, Vol. 22, Opinions, pages 343, 347, in which it is held that Section 4 of the Act of September 9, 1890, which was superseded by Section 18 of the Act of March 3, 1899, and which conferred like authority upon the Secretary of War in respect to bridges over the navigable waterways of the United States, would not be sufficient authority to warrant the Secretary of War in requiring changes to be made in the *Bellaire* bridge erected under the Act of July 14, 1862, at the expense of the owner, without compensation. This opinion holds that:

“The Act of 1890 must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872 or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure. The same conclusion must be reached in regard to the Act of March 3, 1899. So far, therefore, as the bridges here in question are concerned, this leaves Section 18 of that Act applicable only to those erected under the Acts of December 17, 1872, and February 14, 1883.”

See also Vol. 22, Opinions of Attorney General, pages 332, 347, wherein Attorney General Griggs advises the Secretary of War as follows:

“The Act of 1890, (with which our Act of 1899 is identical and supersedes), must be construed to apply only to such bridges as are constructed under the authority of an Act of Congress, either the Act of 1872, or under a special Act, which expressly reserved to Congress the right to require changes or modifications in the structure.”

Several things stated in appellant's brief, it seems to us, are impertinent. Certainly it can make no difference to the decision of this cause as to whether or not the decision of the lower Court was rendered late in the afternoon or early the next morning; as a matter of fact it was not late in the afternoon when the verdict was directed.

The last clause in appellant's brief is also impertinent. Statements of matters outside of the record cannot affect the decision of this case. It must be decided on its merits, and upon the points argued upon by counsel and appearing upon the record.

The fact that payments have been heretofore made to plaintiff, if it has any effect at all, must be to prejudice the defendant's contention, and the statement of counsel that the War Department officials have suggested that the case be defended, can have no bearing on the ultimate decision in this case.

We respectfully submit that the judgment should be affirmed.

JOHN BOYD AVIS,  
DAVID O. WATKINS,  
*Attorneys for Plaintiff.*

# New Jersey Court of Errors and Appeals

---

Stille C. Chew, et al., part-  
ners, trading as Chew  
Brothers,  
*Plaintiffs & Appellees,*

vs.

Pennsylvania Railroad  
Company,  
*Defendant & Appellant.*

On Appeal  
From Judgment in  
the Gloucester Cir-  
cuit.

---

## BRIEF FOR PENNSYLVANIA RAILROAD COMPANY, APPELLANT.

---

### I.

The complaint (pages 1 to 3), states in the first count that the railroad company is a corporation owning and operating a line of railroad extending from Camden through Bordentown in the State of New Jersey, and that the company's trains are carried across Crosswick's Creek, a navigable stream, by a bridge erected by the company over said navigable stream, and that the bridge was erected and

maintained *without a draw* and was an obstruction to the navigation of said stream. That it obstructed the plaintiffs in taking their dredge up the creek in order to carry out a contract. The second count charges that it likewise obstructed the navigation of the stream by the plaintiffs' dredge upon its return trip. The third count states that the aforesaid damages arising from delay, labor and materials, were caused by the fact that the defendant *unlawfully obstructed* the navigation of said Crosswick's Creek.

It will be observed that under the rule that pleadings are construed against the pleader, that it is admitted by the complaint that the bridge was lawfully erected. Also that the gravamen of the action is that the bridge was erected and maintained without a draw, and because thereof the bridge was an obstruction to the navigation of the stream. Also that the statement in the third count, that it unlawfully obstructed the navigation of the stream, is a conclusion of the pleader.

The answer (pages 4, 5), admits the matters stated in the complaint except the items setting out delay, loss and expense, and that the damages were sustained because the defendant unlawfully obstructed the navigation of the said stream. The defenses were that the amounts demanded were excessive; that they were unlawful. That there is no cause of action on the part of the plaintiffs by reason of the River & Harbor Act passed by Congress in 1899, giving to the Secretary of War jurisdiction to determine whether railroad and other bridges obstructing navigation are unreasonable obstructions to the free navigation of the streams over which they had been constructed.

Upon the call of the case for trial, upon the open-

ing of plaintiff and after the opening of defendant, motion for direction of verdict for the defendant was made by its counsel, but the same was refused, and there being no dispute as to the facts, verdict was directed by the Court in favor of the plaintiffs for \$600.

## II.

The book shows that the questions raised under the third defense were fully discussed before the trial Court and that the Court was requested to continue the case until the following morning, it being late in the afternoon, in order that the Judge might read the statute and give it full consideration. The first three grounds of appeal (pages 7, 8), state that the several counts disclose no cause of action because they do not allege that the railroad bridge was an unreasonable obstruction to the free navigation of the creek, and that it had been so declared by the Secretary of War. The fourth states that the complaint does not disclose a cause of action, because it does not set forth a cause of action by reliance upon the statute in question, and that the Secretary of War had determined the said bridge to be an unreasonable obstruction. The fifth is that the proof declared to the Court upon the opening for the plaintiffs, does not state a cause of action because it alleged simply that the bridge was an obstruction to the navigation of the creek to the extent that it caused delay to the plaintiffs' dredge in going to and coming from their work. The sixth, that the Court unlawfully directed a verdict for the plaintiffs upon that opening and without an offer of proof that the

said bridge was, and had been declared, an unreasonable obstruction to navigation in accordance with the statute.

### III.

We submit that a motion for direction for the defendant is equivalent to a motion to strike out the complaint as stating no cause of action—a practice equivalent to the former practice of demurrer. Reference to the leading case of the *Stephens & Condit Transportation Co. vs. The Central Railroad Co. of New Jersey*, 4 Vroom, page 229, opinion by Chief Justice Beasley, shows that the complaint is bad.

The first two counts of the declaration demurred to set out that the defendants wrongfully constructed a railroad bridge across Newark Bay and wrongfully and unlawfully drove piling into the grounds under the waters of the bay so near to the navigable channel of the said bay, as greatly and unlawfully to obstruct and narrow the channel and obstruct navigation, etc. The opinion holds that the Court can notice judicially the charter of the company and its right thereunder to build said bridge.

“I have already said, this supplement must receive judicial recognition. If, then, we are to understand that the bridge described in the declaration is a bridge built by force of this supplement, it would seem necessarily to follow, that the counts in question disclose no ground of action.” (See page 233.)

“But these cases must be carefully distinguished from those in which the plaintiff himself shows the existence of facts which are not

to be regulated by the common law alone. Under such a condition of things, it may appear that the common law right of the plaintiff as to the particular matter, no longer exists, having been destroyed or superseded by the statutory right of the defendant." (See last 7 lines, page 235.)

"But in such case it must further appear in what respects the erection of such bridge is a violation of law. In this latter case, the abuse of the statutory power conferred on the defendants is the gravamen of the suit;" (beginning on 7th line from top of page 237).

The complaint in the cause at bar is superior to that referred to only in the particular that it recites its gravamen or cause of action to be based upon the fact that the bridge contained no draw; but without stating any proposition upon which the absence of a draw would make the bridge unlawful, except, inferentially that a stream which is navigable, i. e., in which there is an ebb and flow of tide, cannot be obstructed even under legislative authority.

As we have said above, the complaint admits that the company had a lawful right to bridge the said stream. Moreover, the Court must take judicial notice of the charter right of the company to construct the bridge. The charter for the Camden & Amboy Railroad & Transportation Company was granted February 4, 1830, and provides for the construction of a railroad with all necessary appendages at some point between Cooper's and Newton's Creeks in the County of Gloucester to some point on the Raritan Bay with a lateral road to Bordentown, etc. By an Act of the Legislature approved March 2, 1832, the

company was given authority to build the branch in question and under that authority the road was built in 1837, 1838.

In the case of *Lister vs. The Newark Plank Road Company*, 9 Stewart, on page 479, the Court said (4 lines from top):

“The Passaic River is a public highway, over which the complainants have a right at all times, to navigate their vessels, free from all obstructions except such as the Legislature may have authorized to be placed therein. The right of the public to use the navigable waters of the State, for the purposes of navigation, is a right given by nature, and is said to exist of common right or by common law, and can only be taken away by legislation. Except so far as Congress may see fit to interfere for the regulation of commerce each State has exclusive jurisdiction over the navigable waters lying within its territorial limits and may pass such laws regulating their use as to it may seem wise.”

This opinion states the well-known rule that legislation on the subject by Congress is superior and exclusive and definitely determines the rights and duties with respect to bridges over navigable streams.

The Federal Statute in question was read into the opening of the defendant and is found on pages 12 and 13 of the State of the Case. It provides that when the Secretary of War shall have good reason to believe that any railroad or other bridge constructed or to be constructed over any navigable waterway is an *unreasonable obstruction* to the free

navigation of such waters on account. etc it shall be the duty of the Secretary, upon giving the parties reasonable opportunity to be heard, to require the owner of the bridge so to alter it as to render navigation through or under it *reasonably* free, easy and unobstructed. The statute then provides for the character of notice, and the duty of the Secretary, upon failure of the owner, to notify the District Attorney of the United States for the proper District to the end that certain specified criminal proceedings may be taken.

It is clear that this statute is definitive and administrative, but not penal; it merely provides that penal steps shall be taken to secure the results provided for in the body of the Act.

This statute has been interpreted and declared to be constitutional in some interesting Federal cases.

*Union Bridge Co. vs. U. S.*, 204 U. S. 364. On criminal information for failure to make alterations under order of Secretary of War in order that navigation be rendered reasonably free, easy and unobstructed. Justice Harlan, page 386:

“By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span or other defects. It stopped, however, with this declaration of a general rule and imposed upon the Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly expressed will of Congress, and will not in any true sense, exert legislative or judicial power.”

*Monongahela Bridge Co. vs. U. S.*, 216 U. S. 177. On criminal information for failure to make alterations under order of Secretary of War in order that navigation be rendered reasonably free, easy and unobstructed. Justice Harlan, page 795:

“It was not for the jury to weigh the evidence and determine, according to their judgment, as to what the necessities of navigation required, or whether the bridge was an unreasonable obstruction. The jury might have differed from the Secretary. That was immaterial; for Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject. It is for Congress, under the Constitution to regulate the right of navigation by all appropriate means to declare what is necessary to be done in order to free navigation from obstruction, and to prescribe the way in which the question of obstruction shall be determined. Its action in the premises cannot be revised or ignored by the Courts or by juries, except when it provides for an investigation of the facts, upon notice and after hearing, before final action is taken, the Courts can see to it that executive officers conform their action to the mode prescribed by Congress.”

*Leovy vs. U. S.*, 177 U. S. Rep. 621, by Justice Shiras, page 632:

“It is a safe inference from these and other cases to the same effect which might be cited that the term, ‘Navigable waters of the United

States' has reference to commerce of a substantial and permanent character to be conducted thereon."

*Kansas City Southern Ry. Co. vs. Kaw Valley Drainage District*, 233 U. S. 75 (Syl.):

"An out and out order of a State Court to remove a bridge that is a necessary part of a line of Interstate Commerce is an interference with such commerce and with a matter that is under the exclusive control of Congress. Interstate Commerce is not a matter that is left to the control of the States until further action by Congress, nor is the freedom of that commerce from interference by the States confined to laws only; it extends to interference by any ultimate organ."

No argument is needed with respect to the applicability of this statute to the case in question, and that no cause of action was shown at the common law, under the proposed proof stated in the opening for the plaintiff, because of this Federal Statute.

There can be no presumption that parties injured by bridges across navigable streams are negligent in applying to the Secretary of War for redress, or that there is lack of action on the part of the Secretary. In fact, the records of the War Department will show the assignment of numerous officers to watch over and preserve the navigability of the same. Thousands of hearings take place every year. Obviously, these plaintiffs had no general desire or purpose to navigate this stream and had no cause for complaint to the War Department. It is most obvious that, under the circumstances, the plaintiffs

were bound to figure in the cost of the dredging contracted for the expense of dismantling and re-assembling their dredge.

Inasmuch as the judgment for the plaintiffs is clearly erroneous upon the merits, we may say outside of the record that these plaintiffs have been collecting damages under similar conditions from the railroad companies, etc., of South Jersey, and that the latter have paid the same under a misapprehension of the law and for the sake of avoiding trouble and litigation. However, the increasing amounts demanded by the plaintiffs took us to go to the War Department for advice, with the result that this suit has been defended in accordance with the suggestion of that Department and upon the statute which it regards as controlling. Consequently, the case is far more important than would appear from the amount involved.

It is respectfully submitted that judgment below must be reversed with costs.

GASKILL & GASKILL,  
*Attorneys of Defendant.*

## New Jersey Court of Errors and Appeals

---

Stille C. Chew, et al.,  
partners, trading as  
Chew Brothers,  
*Plaintiffs and Appellees,*

vs.

Pennsylvania Railroad  
Company,  
*Defendant and Appellant.*

On Appeal.

---

### REPLY BRIEF FOR PENNSYLVANIA RAIL- ROAD COMPANY, APPELLANT.

---

#### I.

An examination of the brief for the appellees discloses some surprising contentions. It is the purpose of this brief to reply thereto. A study of the cases cited from the Federal Reports by counsel for appellees confirms our original assumption that the Federal Statute relied on at the trial is conclusive, and that the trial Judge should have directed a verdict for the defendant company.

The Court will note that the dredge of the plaintiffs was not moving in commerce, but for the purpose of performing a job of dredging above the bridge, and that it was necessary only to remove the superstructure of the dredge in order to pass through the bridge over the said Crosswick's Creek. The defendant admitted that the stream was navigable, knowing that the only contention was that it was navigable for scows. That there is no mistake as to this, is shown by the admission on page 4 of the appellees' brief. That it was not navigable by dredges with a superstructure is clear from the facts in the case.

Our further study of the case causes us to withdraw the abstract from the Lister case and the comment thereon on page 6 of our brief, as well as the abstracts from the Leovy and Kansas City cases at the bottom of page 8 and the top of page 9 of our brief.

## II.

Counsel for appellees contends strenuously that the appeal must be limited solely to the applicability of the Federal Statute. But we insist that this is too narrow a view, and we insist that there is no contradiction between the statutes of this State on the subject, and the Federal Statute in question, but that the statutes of this State will be construed harmoniously with the Federal Statute relied on.

We submit that counsel for appellees cannot rely successfully on the State Statute at this time, because they have not brought the case within that statute (Compiled Statutes of N. J. Vol. 3, page 3693), because they have not shown that Cross-

wick's Creek at that point in question was used for the navigation of boats or flats, etc., at the time of the passage of the Act in 1877.

We call attention to the fact that the phrase "free and uninterrupted navigation" in the State Statute is not absolute. Our study of the authorities convinces us that the term "free" relates to freedom from imposts, taxes and duties. That the provision against interruption of navigation does not bar the State Legislature and the Federal Congress from impairing navigation.

It is interesting to observe that this statute has been largely obsolete for a long time, and that the preservation of the rights of navigation has been left with the Federal War Department.

A reference to the two leading authorities in this State shows that there has never been in New Jersey a closer interpretation of the right of navigation than is stated in the Federal Statute, to wit, "Unreasonable obstruction." See *Thompson, Attorney General, et als. vs. The Paterson & Hudson River Railroad Co., et als.* Opinion by the Court of Errors and Appeals, 9 Equity, page 526, and *The Newark Plank Road and Ferry Co., et als. vs. Elmer, et als.* Opinion by the Court of Errors and Appeals, 9 Equity, page 754.

In passing we wish to say that the Lister case (in the Court of Chancery) cited in both briefs inaccurately describes the right of navigation as one given by nature. It is simply—as stated by our Court of Errors and Appeals, 9 Equity, bottom of page 558, "A pre-existing public right." As stated in numerous Federal cases, the right of navigation is paramount, but not exclusive of the right of transportation by land.

Counsel for appellees concede (bottom of page 5

of their brief, that the bridge was lawfully constructed under an Act of the State Legislature, but assert that there is nothing in the Act which permits the obstruction of such navigation as usually operates on the streams crossed by the railroad bridges. It has not been shown in this case that a dredge with a superstructure usually operated on the stream in question, but the inference is clearly to the contrary. Moreover, the Legislature undoubtedly authorized some impairment of the usual navigation upon the construction of the bridges. Counsel has failed to show that this bridge was unlawful because of its unreasonable obstruction to the usual navigation thereon.

With respect to the cases cited on page 5 of appellees' brief, we may say that the Anderson case has no relation whatsoever to the facts or principles involved in this case, because it turned upon the matter of "Jury Question" arising out of alleged negligence of bridge tenders in the operation of a draw. The opinion in the Mehrhof Brothers case is both obsolete and of no weight as a precedent, because of a subsequent review in the Court of Errors and Appeals. The citation at the bottom of page 5 and top of page 6 of appellees' brief is but a few lines taken bodily from the center of a paragraph, omitting other principles of vital importance in the determination of the law on this subject.

The first abstract of principle on page 6 is not applicable to this case because this bridge did not destroy the navigation of the stream. The doctrine cannot be found in the volume and page of Cyc cited. The three New Jersey decisions cited in that connection do not bear out the principle stated; nor have they any connection whatsoever with the facts or law involved in this case.

The Texarkana Railway Co. case on page 7 of appellees' brief is obsolete because it was decided before the passage of the Federal Statute relied on. Moreover, it is not in point with the case at bar, because it appears that that bridge was illegally constructed. The Tinsman case on page 8 of appellees' brief does not support the principle stated and is not in point. That was an embankment and not a bridge case.

Counsel contend on page 8 of their brief that the burden is on the defendant of showing that the obstruction is lawful. But that contention is based on an erroneous assumption of conclusions. We have not examined his authorities, for the defendant carried its burden of proof by the Court's cognizance of the Legislative Enactment granting the charter for the Camden and Amboy Railroad and Transportation Co. in February, 1830, providing for the construction of a railroad with all necessary appendages, as well as by presenting to the Court the Federal Statute relied on.

The other cases on pages 8, 9, 10 and 11 are both obsolete and immaterial to this argument.

### III.

This brings us to the second section of the brief for appellees and the argument upon the effect of the said Federal Statute. We submit that the interpretation placed by counsel upon that Act is inaccurate and vague. The purpose and effect of that Act is stated by the Supreme Court in the Union Bridge Co. case and Monongahela Bridge Co. case cited in our preliminary brief. The decision in the latter case would seem to dispose posi-

tively of any contention that cases of this character are jury cases, or that the Act is one putting a remedy in the hands of individual litigants, concurrent with the power in the Secretary of War to prevent unreasonable obstructions to navigation.

We do not dispute the principle stated on page 12 of the brief and abstracted from *Montgomery vs. Portland*, 190 U. S. 89. This abstract is incorrectly stated in quotation marks, as it is an inaccurate copy from one section of the Syllabus. The Gring case adds no weight and is not in point, because it disposes merely of the question of liability arising out of a collision in a harbor.

Counsel for appellees seek to confuse the issue by raising a question as to whether this Federal Act makes all existing bridges lawful until the Secretary of War declares that those structures are unreasonable.

The *Montgomery* case held that the Federal Act in question does not go to the extent of giving to the Secretary of War the sole power to legalize structures within navigable waters of a State, but to make such a structure contingent upon the concurrent or joint assent of both the National Government and the State Government. In actual practice the Federal Government does not join in a formal assent to the Legislative Enactment of the State, but by implied assent permits such a structure to stand in the absence of orders to the contrary from the Secretary of War under the 18th Section of that Act. This case is of vital importance in settling the fundamental law, but it is not pertinent to plaintiffs' issue in the case at bar.

The case of *Lakeshore and Michigan R. R. Co. vs. Ohio*, 165 U. S. 365 (on page 13 of appellees' brief), is a decision upon one phase of the Act in question.

The first abstract from that opinion is an inaccurate copy of a Syllabus. It should not be in quotation marks. The Railway Co. carried to the U. S. Supreme Court a judgment of the Supreme Court of Ohio, affirming a judgment of a State Court on *quo warranto*, requiring the defendant, a State corporation, to remove a bridge over a navigable stream within the limits of that State, or place a draw in it. The company contended that the Federal Act in question manifested the purpose of Congress to deprive the States of all authority to control and regulate any and every structure over all navigable streams, although wholly within their territory. The Court said,—“on the face of this statute it is obvious that it does not support the claim based on it. The delegation of duty to the Secretary does not confer on him power to give original authority to build bridges.” The Court concluded its opinion with the language found at the bottom of page 13 of appellees’ brief.

Counsel have printed some of this language in large type to catch the attention of this Court, but a careful interpretation shows that it does not support plaintiffs’ contention. That Court said that—“its obvious purpose *was not to deprive* the State of authority (*by its Legislature*) to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create an additional and cumulative remedy (by Act of the Secretary of War) to prevent such structures, although lawfully authorized, from interfering with *commerce*. This decision is merely one of a series recognizing the right of a State by its Legislature to impair navigation somewhat by the construction of necessary structures over navigable streams for transportation, but it does not

recognize or permit what counsel desires, and that is, the right of individuals to have jury trials upon the extent of impairment of the right of navigation.

The Margaret J. Sanford case on page 14 of appellees' brief is merely a decision of a District Court and adds nothing to the elucidation of the case at bar.

It is clear from the Federal cases cited that the New Jersey case of *Lister vs. Newark Plank Road Co.*, 35 N. J. E. 477, does not state the law of this day. It is incorrect to state that the jurisdiction over navigable streams in the State Legislature is exclusive, etc., except so far as Congress may see fit to interfere for the regulation of commerce. The Federal cases use a different term and state that the jurisdiction in the State Legislature is *plenary*, except, etc., and not exclusive. Counsel state on page 15 of their brief a proposition that would be important—if true, and give *Egan vs. Heart*, 165 U. S. 188 as its authority. An examination of the case shows that there is no connection whatever between the principle stated and the citation. The other cases on that page have no relation to the case at bar. The statement at the top of page 16, for which the Cummings case is given as authority, is erroneously stated.

Counsel conclude their brief with a contention based upon two opinions of Attorney Generals of the United States that the Federal Act in question cannot apply to the bridge in the case at bar. A reference to the opinions shows that they have been misconceived. The language copied seems superficially to question the jurisdiction of the Secretary of War over this bridge. But on examination of the opinion cited at the bottom of page 16 and top of page 17, it appears that it is based upon conclu-

sions formed as to the meaning of the decision of the U. S. Supreme Court in the case of *Bridge Co. vs. United States*, 105 U. S., page 470. That was a case of great importance and one in which the Court divided upon the right of the Federal Government to withdraw its legislative assent to the construction and maintenance of a bridge, and compel alterations therein at the expense of the owner and without compensation therefor by the Government.

That the decisions so confusingly quoted turn upon this point is shown by the fact that the abstract copied at the top of page 18 is preceded immediately by the following omitted language:

“In my judgment, as applied to this particular bridge, this authority would not be sufficient to warrant the Secretary of War in requiring changes to be made in this bridge at the expense of the owner without compensation.”

It is clear after a survey of opponents' brief, that the War Department had been properly advised as to its power in the premises, and that it correctly suggested to this defendant company that this suit be defended upon the Federal Statute presented to the trial Judge upon the trial of the case. The active operation of the Secretary of War in modifying the Federal Government's assent to bridges over navigable streams within a State, is evidenced by the hearings that occur constantly—as is shown by the records of the War Department.

We submit further that under the statutes of the State there has been no unreasonable obstruction of the navigation of this stream by this bridge, and that the plaintiffs have not shown themselves to be within the statutes and damaged by necessity of removing the superstructure in order to pass the bridge.

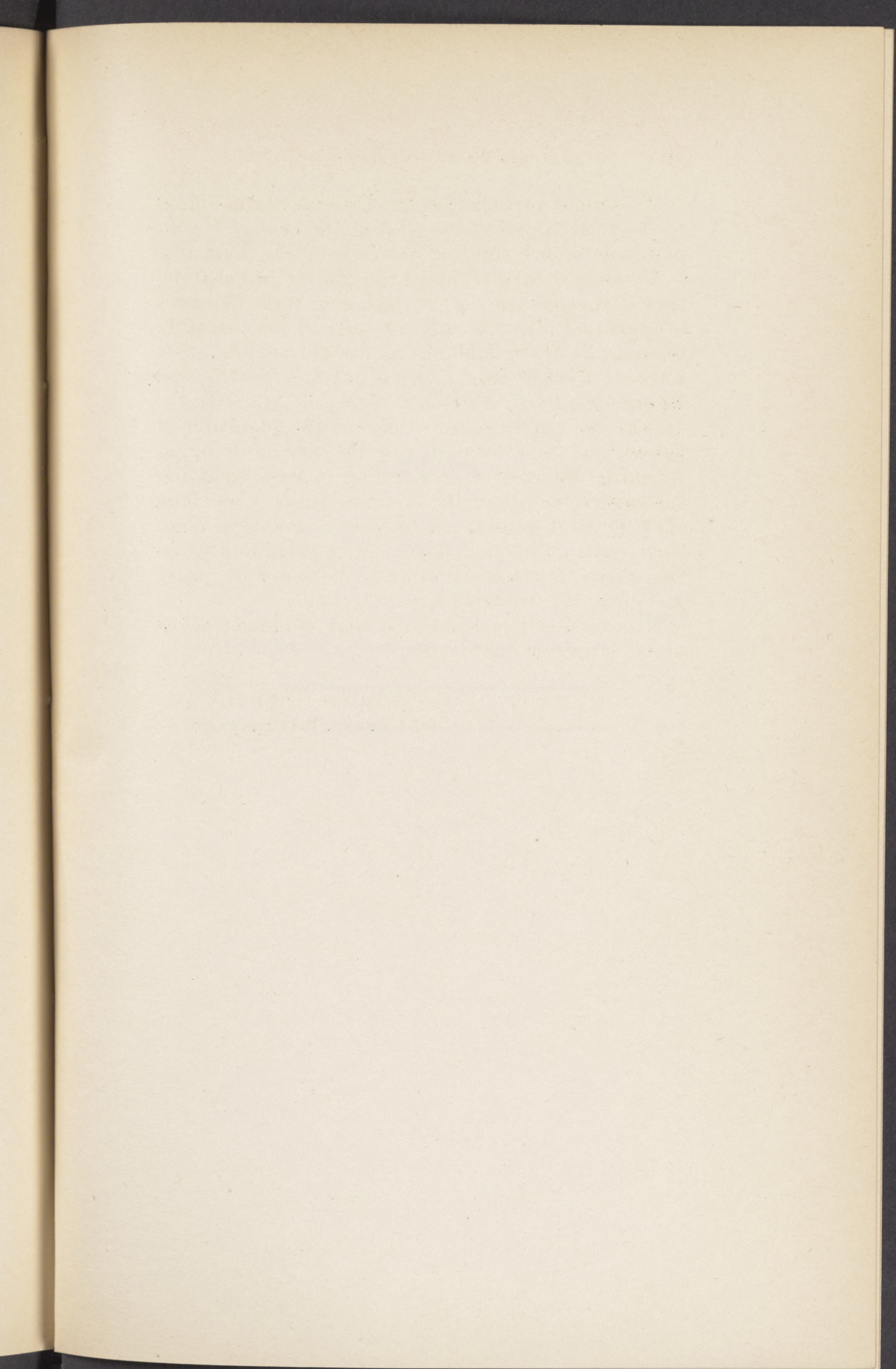
We submit further that the Federal Statute cited to the trial Judge at the trial of the case is a complete bar to any right of recovery by the plaintiffs.

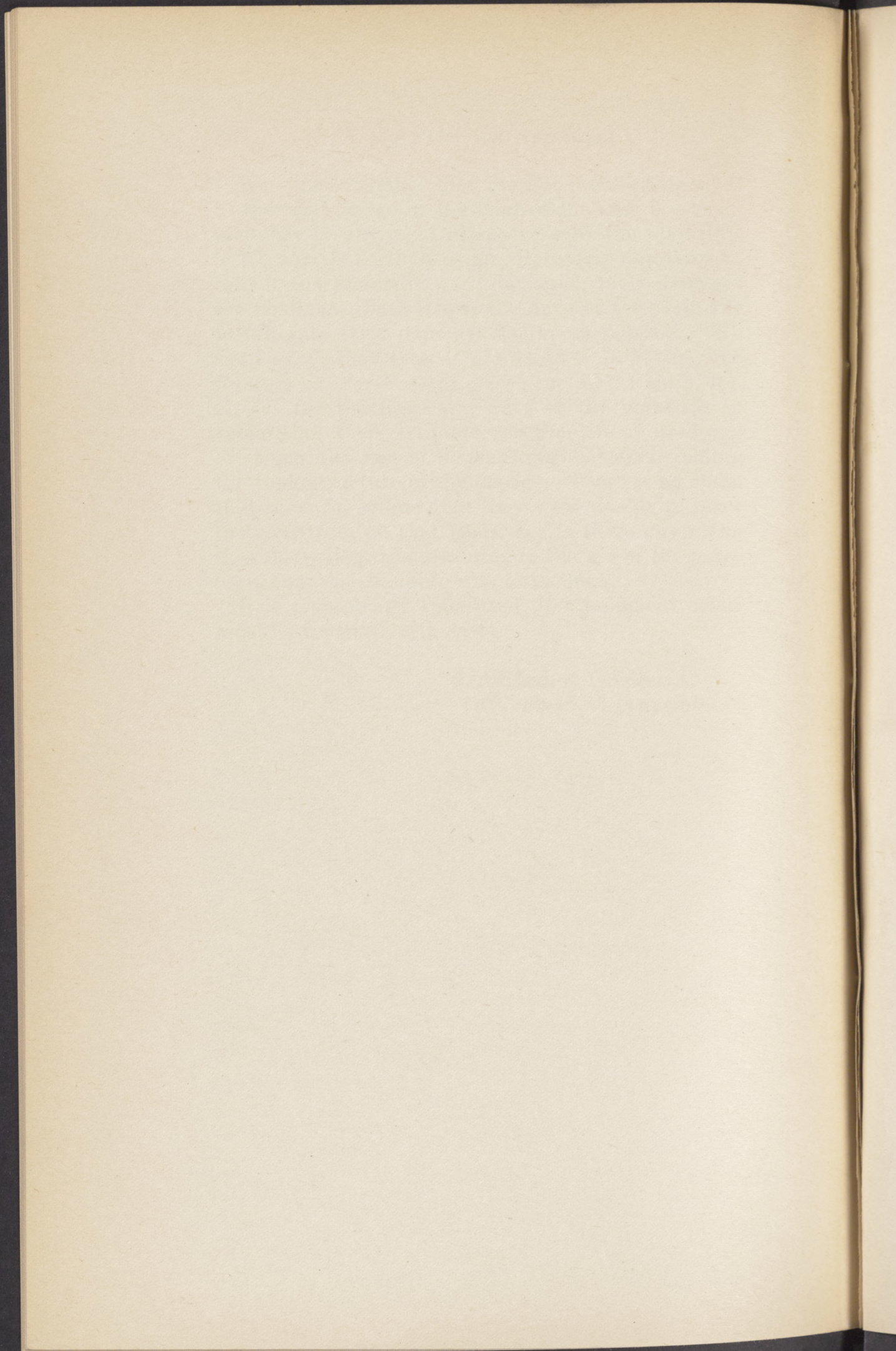
We submit further, as an alternative proposition, that if the plaintiffs were damaged, their damages are nominal. That it was the duty of the plaintiffs to mitigate their damages so far as possible. See *Lord vs. Carbon Iron Mfg. Co.*, 42 N. J. E. 157, and *Ramsey vs. Perth Amboy, etc., Co.*, 65 Atlantic, 461. It was the privilege and duty of the plaintiffs in submitting their estimate for the job of dredging to charge the cost of dismantling and reassembling the superstructure of the dredge. There is no claim that they did so and that they were unable to place their contract on that basis, nor is there any claim that these plaintiffs are suing to the use of the party for whom the dredging was to be done.

It is respectfully submitted that judgment below must be reversed with costs.

GASKILL & GASKILL.

*Of Counsel for Appellant.*

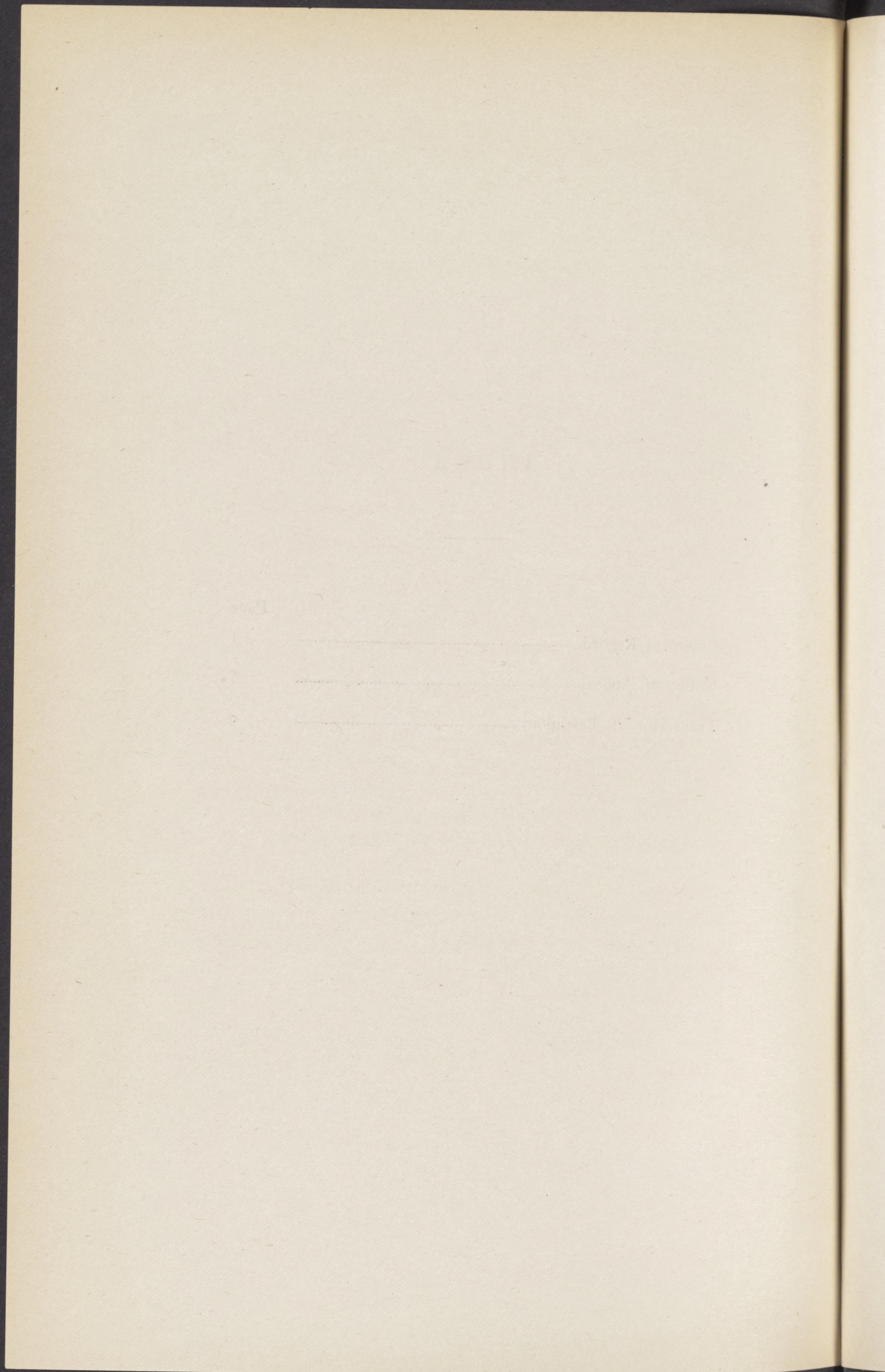




## INDEX.

---

	Page
Judgment Record .....	1
Notice of Appeal.....	6
Transcript of Testimony.....	9



**JUDGMENT RECORD.**

**NEW JERSEY SUPREME COURT.  
GLOUCESTER COUNTY.**

---

STILLE C. CHEW and MIL-  
TON L. CHEW, Partners,  
Trading as CHEW  
BROTHERS,

vs.

PENNSYLVANIA RAILROAD  
COMPANY, a Corporation.

JUDGMENT RECORD.

JOHN BOYD AVIS,  
*Attorney.*

10

20

---

Pennsylvania Railroad Company, a corporation, the defendant in this cause, was summoned to answer unto Stille C. Chew and Milton L. Chew, partners, trading as Chew Brothers, the plaintiffs therein, in an action at law upon the following complaint:

Summons issued September 9th, 1914.

The plaintiffs, Stille C. Chew and Milton L. Chew, partners, trading as Chew Brothers, both of the Township of West Deptford, County of Gloucester and State of New Jersey, say that: **30**

1. On and before October 11, 1913, and thence hitherto plaintiffs owned and operated a certain floating dredge for the digging of mud, sand and

other materials, which they used in their business, for hire.

2. The defendant, Pennsylvania Railroad Company, is a corporation, owning and operating a line of railroad in the State of New Jersey, a portion of which extends from Camden, in the County of Camden, through Bordentown, in the County of Burlington, to Trenton, in the County of Mercer, the trains  
10 of said defendant being carried across Crosswicks Creek, a navigable stream, by a bridge erected by said defendant over and across said navigable stream, which said bridge was erected and maintained by said defendant without a draw, and at the times hereinafter stated was an obstruction to the navigation of said navigable stream.

3. Plaintiffs having procured employment for their said dredge at a point above said bridge, and desiring to take said dredge up said Crosswicks  
20 Creek, approached said bridge on or about October 10, 1913, and because of the obstruction of said navigable stream by the bridge of said defendant as aforesaid, it was necessary for said plaintiffs, to navigate said stream and get said dredge up said creek to the point where work was to be performed, to take down the superstructure of said dredge, and were obstructed by said bridge, which caused a delay to plaintiffs' said dredge of 6 days, to wit, Octo-  
30 ber 11, 13, 14, 15, 16 and 17, 1913, causing a loss to said plaintiffs of \$40 per day, a total of \$240 for delay, and expense for extra labor and materials of \$25.50.

## SECOND COUNT:

1. After plaintiffs had completed their work on Crosswicks Creek, it was necessary to take their said dredge out of said creek to do and perform other work at another place along the Delaware River, and its tributaries, and approached the bridge aforesaid, on or about November 6, 1913, and because of the obstruction of said navigable stream by the bridge of said defendant as aforesaid, it was necessary for said plaintiffs, to navigate said stream and get said dredge out of said creek, to a point where they had work to be performed, to again take down the superstructure of said dredge, and were obstructed by said bridge, which caused a delay to plaintiffs' said dredge of 9 days, to wit, November 7, 8, 10, 11, 12, 13, 14, 15 and 17, 1913, causing a loss to said plaintiffs of \$40 per day, a total of \$360 for delay, and an expense for extra labor of \$31.50.

10

20

## THIRD COUNT:

1. Plaintiffs say that the aforesaid damages sustained by them were caused by the fact that said defendant unlawfully obstructed the navigation of said Crosswicks Creek, and by reason thereof plaintiffs have been specially damaged.

Plaintiffs demand \$657.00 damages.

JOHN BOYD AVIS, 30  
*Attorney for Plaintiffs.*

(Filed Sep. 16, 1914.)

The defendant, a corporation of Pennsylvania with offices in the City of Philadelphia, State of Pennsylvania, and elsewhere says:

1. It admits the matters stated in the first paragraph of the complaint.

2. It admits the matters stated in the second paragraph of the complaint.

3. It admits the matters stated in the third paragraph of the complaint, except the statement with respect to delay, loss and expense.

10

## SECOND COUNT:

1. It admits the matters stated in the first paragraph except the statement as to delay, loss and expense.

## THIRD COUNT:

1. It denies the matters stated in the third count.

20

## FIRST GROUND OF DEFENSE.

The amount demanded by the plaintiff for the loss stated in the above complaint for expense of labor and material is excessive.

## SECOND GROUND OF DEFENSE.

30 That the amount demanded by the plaintiff for the loss stated in the above complaint by reason of delay is unlawful.

## THIRD GROUND OF DEFENSE.

That there is no cause of action on the part of the plaintiff by reason of the River and Harbor Act

passed by the Congress of the United States and approved March 3, 1899, Statutes at Large, Volume 30, page 1151 to 1155, giving jurisdiction over railroad or other bridges obstructing navigation to the Secretary of War to determine whether the same is an unreasonable obstruction to free navigation.

GASKILL & GASKILL,  
*Attorneys of Defendant.*

(Filed Sep. 30, 1914.)

10

This case was tried before Judge Howard Carrow, with a jury, at the Gloucester County Circuit, on June 1, 1915.

The jury, by direction of the Court, rendered a general verdict against the defendant and in favor of the plaintiffs, for six hundred dollars (\$600).

Whereupon it is adjudged that the plaintiffs recover of the defendant the sum of six hundred dollars and their costs, which are taxed at the sum of fifty-five dollars and eight cents, making in the whole the sum of six hundred and fifty-five dollars and eight cents.

\$600.00  
55.08  
-----  
\$655.08

20

Judgment entered June 11, 1915.

WM. S. GUMMERE,  
*C. J.*

30

I, WILLIAM C. GEBHARDT, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered

in the above-stated cause and also of the notice as the same remains of record and on file in my office.

In testimony whereof I have set my  
 [SEAL] hand and the seal of said Court at Trenton, this seventeenth day of June, A. D. nineteen hundred and fifteen.

WM. C. GEBHARDT,  
*Clerk.*

10

---

**NOTICE OF APPEAL.**

NEW JERSEY SUPREME COURT.

---

20 STILLE C. CHEW and MIL-  
 TON L. CHEW, Partners,  
 Trading as CHEW  
 BROTHERS,

*Plaintiffs and  
 Appellees,*

vs.

PENNSYLVANIA RAILROAD  
 COMPANY,

*Defendant and  
 Appellant.*

ACTION AT LAW.

NOTICE OF APPEAL.

30

---

*To John Boyd Avis, Esq.,  
 Attorney of Plaintiffs:*

Take Notice that the defendant appeals to the Court of Errors and Appeals from the judgment entered in this case on the following grounds:

1. The First Count of the complaint discloses no cause of action against the defendant because it does not allege that the said railroad bridge was an unreasonable obstruction to free navigation of Crosswicks Creek, a navigable stream, and that it had been so declared by Secretary of War.

2. The Second Count of the complaint discloses no cause of action against the defendant because it does not allege that the said railroad bridge was an unreasonable obstruction to free navigation of Crosswicks Creek, a navigable stream, and that it had been so declared by Secretary of War. 10

3. The Third Count of the complaint discloses no cause of action against the defendant because it does not allege that the said railroad bridge was an unreasonable obstruction to free navigation of Crosswicks Creek, a navigable stream, and that it had been so declared by Secretary of War. 20

4. That the complaint does not disclose a cause of action on the part of the plaintiffs by reason of the River and Harbor Act passed by the Congress of the United States and approved March 3rd, 1899—Statutes at Large, Volume 30, page 1151 to 1155, giving jurisdiction over railroad or other bridges obstructing navigation to the Secretary of War to determine whether the same are an unreasonable obstruction to free navigation. 30

5. Because the proof declared to the Court upon the opening for the plaintiffs alleging simply that said "bridge is an obstruction to the navigation of that creek to the extent that it caused delay to Chew Brothers' dredge in going to and coming from their

work" and for damage arising from delay at the said bridge, etc., does not state a cause of action.

6. Because the Court unlawfully directed the jury to find a verdict for the plaintiffs for six hundred dollars (\$600) upon the opening of the plaintiffs that the defendant company was liable for damages because the said "bridge is an obstruction to the navigation of that creek to the extent that it caused  
 10 delay to Chew Brothers' dredge in going to and coming from their work" and the opening of the defendant confessing that the said bridge obstructed the passage of the dredge of the plaintiffs in going to and coming from their work in Crosswicks Creek, but that the same was not an unreasonable obstruction to the navigation of the said stream and that it had not been so declared by Secretary of War in accordance with the River and Harbor Act passed by the Congress of the United States and approved  
 20 March 3rd, 1899, Statutes at Large, Volume 30, page 1151 to 1152.

GASKILL & GASKILL,  
*Attorneys of Defendant and  
 Appellant.*

[ENDORSED]

Service acknowledged June 23rd,  
 1915.

30

JOHN BOYD AVIS,  
*Attorney of Appellees.*

Filed July 9, 1915.

Jul 9 1915  
 THOMAS F. MARTIN,  
*Clerk.*

**TRANSCRIPT OF TESTIMONY.**

NEW JERSEY SUPREME COURT.  
GLOUCESTER COUNTY CIRCUIT.

---

STILLE C. CHEW and MIL-  
TON L. CHEW, Partners,  
Trading as CHEW  
BROTHERS,  
vs.  
PENNSYLVANIA RAILROAD  
COMPANY. } ACTION AT LAW.

10

---

20

May Term, 1915.

---

APPEARANCES:

For the Plaintiff, JOHN BOYD AVIS, ESQ. 30  
For the Defendant, GASKILL & GASKILL, ESQS.

---

Before CARROW, J., and a Jury.

## THE CASE FOR THE PLAINTIFF.

Mr. Avis opens the case for the plaintiff to the jury as follows:

If the Court please, Gentlemen of the Jury: This is an action brought by Chew Brothers, a firm consisting of Stille C. Chew and Milton L. Chew, of Mantua, against the Pennsylvania Railroad Company. The facts which we expect to submit to you are that Chew Brothers own and operate a mud-digging machine, a certain dredge, and in the operation of that are called, of course, to various places, navigable waters and otherwise along the Jersey shore, the Delaware shore particularly, and that in the fall of 1913 in the operation of this dredge in doing some work in Crosswicks Creek in Burlington County or Mercer—I think in Burlington, particularly in Burlington and probably a little in Mercer—  
20 it became necessary to go up this creek. Across the mouth of it or near the mouth of it the Pennsylvania Railroad maintains a bridge over which trains pass to and fro; it is on the Amboy division from Bordentown to Trenton. We expect to show that that bridge is an obstruction to the navigation of that creek to the extent that it caused delay to Chew Brothers' dredge in going to and coming from their work, in going to the work in Crosswicks Creek October 11th, 13th, 14th, 15th and 16th; we allege  
30 that they were delayed those days by reason of the obstruction of this railroad bridge, and in coming out we allege that they were delayed November 7th, 8th, 10th, 11th, 12th, 13th, 14th, 15th and 17th. Now, if we show these facts to you and establish that Chew Brothers were delayed at this bridge, it being necessary to take down even at the best a part of

their superstructure of the dredge, the boom and some other of the superstructure to get through, and even then, as the testimony will show in this case, they had to wait some considerable time for the tide to be sufficiently lowered, especially in coming out when there was a freshet on, before they could get their dredge underneath this bridge.

Now, we claim and expect to prove to you that this delay was caused by unlawful acts of the Pennsylvania Railroad Company. If we do show you 10 that, then we shall ask that you render a verdict in favor of Chew Brothers against the Pennsylvania Railroad Company for such amount as they may have been damaged, the work that it was necessary to do to take down and get under this bridge and the lumber that they were compelled to purchase by reason of it. The testimony itself will develop as to the amount of damages which they claim they ought to have, and if you are satisfied with those facts under the direction of the Court, we shall ask for a verdict 20 for the bill for this time and for such amount as this jury feels the plaintiffs are entitled to.

Mr. Logan Gaskill opens the case for the defendant to the jury as follows:

May it please the Court, Gentlemen of the Jury: The question as to whether there is any liability in this case is a question of law pure and simple. The question of fact, gentlemen, in the event that the Court disposes of the question of law in favor of the 30 plaintiffs' contention, will be as to how large the amount of our liability is, as to whether they have properly exercised the care and haste that they should in getting their dredger dismantled and reassembled and all that sort of thing.

If the Court please, there is a Federal statute that

- entirely governs this matter, and I notified counsel that we would rely upon the statute. My pleadings were drawn before I had seen the statute, and I had not particularly relied on it in my pleadings, but I gave them notice of the statute so that they would not be taken by surprise. An Act of Congress—I read from an extract from the River and Harbor Act, approved March 3, 1899, found in Statute Laws, Volume 30, pages 1151 to 1155, Section 18: “That
- 10 whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed, over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said secretary,
- 20 first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes recommended by the Chief of Engineers that are required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the
- 30 Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings hereinafter mentioned may be taken. If the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore re-

quired, from the Secretary of War, and within the time prescribed by him wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed 10  
 a new offense, and subject the persons, corporation or association so offending to the penalties above prescribed: Provided, That in any case arising under the provisions of this section an appeal or writ of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court either by the United States or by the defendants."

Now, as a matter of course, we call upon the plaintiffs to amend their declaration, because they must 20  
 prove more than is stated in their declaration or complaint. I will turn to that, first calling your Honor's attention to the fact that a railroad company or a turnpike company or a municipality that may construct a bridge which obstructs navigation or a navigable stream is not maintaining an unlawful obstruction unless it has been declared to be an unreasonable obstruction to the free navigation of such waters by the War Department. Your Honor will recall that it provides a method by which a hearing 30  
 is to be had by the War Department, so that counsel's case must rest upon proof of the fact that here is an unreasonable obstruction, so determined by the War Department, and he must necessarily first prove that there has been a complaint, a hearing and a declaration by the Secretary of War that this is an un-

reasonable obstruction. In other words, in a suit at law, they cannot call upon the Court and jury to determine whether or not it is an unreasonable obstruction, because that is entirely within the jurisdiction of the Secretary of War. Now, the first two counts of the complaint do not state a cause of action. The first count in the second paragraph says: "The defendant, Pennsylvania Railroad Company, is a corporation owning and operating a line of railroad  
10 in the State of New Jersey, a portion of which extends from Camden, in the County of Camden, through Bordentown, in the County of Burlington, to Trenton, in the County of Mercer, the trains of said defendant being carried across Crosswicks Creek, a navigable stream, by a bridge erected by said defendant over and across said navigable stream, which said bridge was erected and maintained by said defendant without a draw, and at the times hereinafter stated was an obstruction to the navigation  
20 of said navigable stream." That does not state a cause of action under this Act of Congress. The second count states that having completed their work on Crosswicks Creek, it was necessary to take the dredge out and that the same bridge then caused an obstruction to said navigable stream; so that does not state a cause of action. The third count states, "Plaintiffs say that the aforesaid damages sustained by them were caused by the fact that said defendant unlawfully obstructed the navigation of said Crosswicks Creek, and by reason thereof plaintiffs have  
30 been specially damaged." Of course, that count is not sufficient in itself unless it involves the statements in the preceding two counts, but it is insufficient by reason of the fact that it says the bridge unlawfully obstructed the navigation without averring that the Secretary of War upon hearing had de-

clared that it was an unreasonable obstruction, and therefore an unlawful obstruction.

Now, our answer admits that the bridge is an obstruction to navigation, because under the statute we are simply called upon to admit or deny; we cannot explain; and I have admitted the facts stated except with respect to the amount that they claim to be due, and that of course we insist that they shall prove. We say that the amount demanded is excessive, and our second ground of defence, that the amount demanded is unlawful. With my opponent's consent, I move to strike out the last two words in the second ground of defence, being the words, "and excessive" so that the second ground of defence will read, "That the amount demanded by the plaintiff, &c., is unlawful." 10

Now, I want to call your Honor's attention to a still further matter in this connection. As a matter of course, the maintenance of free navigation in navigable streams is one of the important works of the War Department. Now, in Section 10 of the Act which I have read, in the last clause it says, "And it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." So that Stille Chew and brother could not lawfully excavate or fill, or alter in any way the channel of any navigable stream in the United States unless the work had been recommended by the Chief of Engineers. Now, whether or not this work was of that character is not dis- 20 30

closed by his complaint. Section 12 provides, "That every person and every corporation that shall violate any of the provisions of Sections nine, ten and eleven of this Act, or any rule or regulation made by the Secretary of War in pursuance of the provisions of the said Section eleven, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding twenty-five hundred dollars nor less than five hundred dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the Court."

10

So, if the Court please, in conclusion, I say that the defence in this case as to the liability is a legal defence; that the question is a question of law, that the statutes have been brought to the attention of counsel, that neither in his pleadings nor in his opening has he stated a legal cause, and I therefore move for a non-suit at this time.

20

The Court: I will hear you.

30

Mr. Avis: Well, if the Court please, it does not seem to me that it is necessary, or that there is anything in that statute that requires us to show that the Secretary of War has ever declared this to be an unreasonable obstruction. There are some cases in New Jersey with relation to the question of obstructions to streams. If the gentleman on the other side had said that the War Department had passed on this proposition and had declared it not to be an unreasonable obstruction, then it might make a difference to the situation, but as I understand it he stands upon the situation that the War Department has never done anything with this bridge at all, never had its attention called to it, and that they

have never taken any steps with relation to it, but that it is necessary for us to show that this has been adjudicated by the War Department.

The Court: Proceed with the second question; what were you doing in that stream?

Mr. Avis: We were not digging in the channel at all; we were digging a canal at the side of it. I have proof to show that absolutely, that we did not touch 10 the channel; we were simply digging a canal from practically the riparian part of it into the works of the sand pit —

The Court: Do you find any cases which sustain your views?

Mr. Avis: On that particular point?

The Court: Where an action of this sort will lie? 20

Mr. Avis: There are a number of cases in New Jersey, that I have a memorandum of, where actions have been brought against different companies for erecting bridges, and the cases all hold that where the Legislature gives a right, as it has undoubtedly in this case, to erect a bridge, they have a right to erect it, but they must take their chances of having it unreasonably obstruct navigation, and damages have been sustained. I have some memorandum of 30 cases here—I did not produce them; I can get them for your Honor without difficulty—where they have sustained damages by reason of obstructions, particularly where there was a drawbridge; in one case I remember they did not open the draw rapidly enough and the schooner going through struck

against something—something got the matter with the draw—in that instance they gave them damages.

Mr. Gaskill: Oh, but that was a different case.

The Court: What was the theory, negligence?

Mr. Avis: No, I don't think the theory was negligence; I think the theory was that they had a right  
10 to construct their bridge in accordance with the permission of the Legislature, but not to obstruct navigation; that they took their chances when it came to obstructing the navigation, but of course the theory here is not based upon the facts as far as the United States statutory requirement with relation to digging in channels, because we did not touch the channel, did not dig it at all; we are not liable under that United States statute. We had a perfect right to be there as far as the United States statute is concerned.  
20 Our proofs will show that we did not touch the channel, did not build a wharf or did not go into the situation that is raised by the statute. Certainly it is not necessary for us to preclude —

The Court: Well, the question of liability depends upon the view the Court takes of the law. I understand there is no disputed question of fact touching the question of liability; the facts are limited, according to Mr. Gaskill's opening, to the damages  
30 claimed. What is your claim?

Mr. Avis: The amount of it, sir? The total amount is \$657. My own idea is that the questions raised by Mr. Gaskill are entirely matters of defence, and if they are brought into the proposition he must first show that the Secretary of War at least has exam-

ined and approved this proposition and allowed it to stay there after complaint; if that was the situation, it would raise a different position entirely.

Mr. Gaskill: May I say a word in answer to counsel? The cases in New Jersey do not raise the Federal question; this is the first time that the Federal question has been raised in one of these cases.

The Court: Yes, but the principle I am getting 10  
at is the principle of law whether or not a citizen  
who has been injured by an obstruction to naviga-  
tion can maintain a suit against the company causing  
the obstruction to navigation. Of course, this is a  
new sort of case to me. The first impression that I  
got of the statute while you were reading it, Mr.  
Gaskill, was that it had reference mainly to steps  
incident to a criminal prosecution. I have not read  
the statute, but I thought from what you said or  
from your reading of it that after the War Depart- 20  
ment has taken action and notified the company, the  
bridge owner, and the company fails to act in com-  
pliance with the request of the War Department, that  
then the district attorney of the district where the  
bridge is located may take action by invoking the  
criminal law, the Federal law.

Mr. Gaskill: May I say a word as to that? My  
thought would be this, that we are not particularly 30  
interested in this case in finding the question of the  
amount, so much as we are in determining the mat-  
ter of principle, and my suggestion would be that  
your Honor take this statute and examine it this  
afternoon or this evening and in the morning—I am  
satisfied the matter is purely one of law—direct a  
verdict either for the plaintiff or for the defendant.

I will waive the proof as to the amount of time that was involved and the amount of material that was purchased and all that sort of thing. We might not get very far with that anyway.

The Court: Well, if there is no disputed question of fact, is there any objection to the Court taking the case?

- 10 Mr. Gaskill: There would be no objection on my part. My thought was this, for me to give to your Honor this statute which comes from the War Department and is so marked, and your Honor will find that this Section 18 that I have referred to, provides two things, first that a railroad or other bridge is not an unreasonable obstruction until it has been declared such by the War Department, and your Honor will find then that in the second place, it provides a means on the part of the United States of  
20 getting rid of an unreasonable obstruction that the parties do not remove or make reasonable themselves.

The Court: Well, if I had a little time, I could clean up some of these other cases and take the matter.

- 30 Mr. Avis: The only question now that Mr. Gaskill is willing to submit to the Court is whether or not that supervision by the United States Government through the Secretary of War precludes us from recovery—is that correct?

Mr. Gaskill: You are entirely too narrow in your statement of my proposition. As stated in my opening, it is a good deal broader than that, but it cer-

tainly does involve that. One of my points is that you must prove first the fundamental proposition to maintain the action, that the War Department has determined this to be an unreasonable obstruction.

Mr. Avis: If the Court determines we do not have to prove that, what then?

Mr. Gaskill: That is merely one step in the progress.

Mr. Avis: Well, what is the next legal step? Is that the question of the digging of the channel? If it is, I want to introduce testimony on that. I think that is a question of fact that ought to be decided by the jury.

10

Mr. Gaskill: As to that proposition, as to whether or not they were altering the channel without authority of the War Department, that really is a matter in which we are not interested. It is a matter in which the United States District Attorney is interested, and I raised that collaterally as an important matter, but if counsel states that they were not digging in the channel, I am perfectly willing that so far as this case is concerned that will not be considered.

20

Mr. Avis: I have witnesses to show that, not only the Chews, but other witnesses.

Mr. Gaskill: For the purpose of this case I am entirely willing to eliminate the question as to whether or not they were lawfully there and digging in the channel or elsewhere.

30

Mr. Avis: If the Court finds that this is not an obstruction —

Mr. Watkins: I have just a little idea on that. I have been thinking over this law —

The Court: Which side are you on, Governor?

Mr. Avis: I am glad to say, if the Court please, he is associated with me.

10 Mr. Watkins: I think that that means this, that the right of the public to use a navigable stream is a right which the Secretary of War or no one else can take away from them, excepting, of course, by some special legislation which might be for the interests of the country at large.

The Court: Wait a minute, Governor; the point I am getting at is whether there is anything here requiring the services of a jury.

20 Mr. Watkins: I don't know; that is a matter which they will talk over.

The Court: If it is purely a court question, I want a little time to consider it.

Mr. Watkins: Yes, that is what I am calling to your attention.

30 Mr. Gaskill: I would like very much to have your Honor take it under advisement this afternoon and evening and charge the jury on the subject one way or the other or direct one way or the other tomorrow morning.

The Court: Do you want a jury trial of this case?

Mr. Gaskill: I don't want a jury trial, no; but I

think so far as reaching a conclusion is concerned, there are various advantages. There is always difficulty as to submitting findings; I must draw a body of requests for findings this evening. My thought is for your Honor to take this statute and make up your mind this evening and direct one way or the other, and then on my motion, the question is entirely raised and clearly raised for appeal.

Mr. Watkins: This is a point I want to endeavor 10  
to impress upon your Honor's mind when you are  
considering this proposition, that the public have a  
right to use that creek for navigable purposes. Now,  
if the government, after a bridge has been built as  
it is there, if the government wants to change that  
bridge, then, before they have any right to order  
the Railroad Company to alter it or change it, they  
have to give the Railroad Company a right to be  
heard on it. That does not take away the right of  
the individual, if the Railroad Company is obstruct- 20  
ing navigation there, to go on and bring his suit,  
but the meaning of that is that if the government  
once decides that the bridge shall be removed after  
the hearing of the Railroad Company, unless they  
do remove it, they can be punished by an indictment;  
that is what that law means.

Mr. Gaskill: We don't agree on that, you see.

Mr. Watkins: No, I presume so. 30

The Court: Now, what do you desire? Have you  
agreed on the amount?

Mr. Avis: Well, the amount we claim is \$657. I  
understood Mr. Gaskill to say, if the Court please,

that they had no dispute about the amount. Of course, that was a disputed question of fact before the jury and one to submit to your Honor. Now, Mr. Gaskill suggests to me that even if your Honor should find in my favor, we ought to reduce the amount to \$500. My clients so far have not consented to it.

10 Mr. Gaskill: My thought is, there is often a difference between the asking amount and the taking amount. We are saving them a good deal of time and expense in the matter of production of witnesses and the payment of attorneys and so forth.

(After consultation with Mr. Avis.) We agree, if you find for the plaintiff it shall be for the amount of \$600, that is, if you decide to charge the jury to find for the plaintiff.

20 Mr. Avis: The only question reserved, I understand, at the present time —

Mr. Gaskill: No, the question of liability is for the Court to consider over night and decide and charge the jury tomorrow.

30 Mr. Avis: Yes, but I understand there is only one question practically; the question is whether or not this United States statute which puts it in the hands of the Secretary of War, precludes our right to recover—isn't that it, practically?

Mr. Gaskill: Practically, yes.

The Court: If I understand you right, Mr. Gaskill, you admit that the bridge of the defendant company, did obstruct this navigable stream?

Mr. Gaskill: Yes, your Honor.

The Court: And that the amount of the plaintiffs' claim which was occasioned by that obstruction was not in dispute?

Mr. Gaskill: No, it is \$600. The question is, whether it was an unreasonable obstruction and such an obstruction that we should pay damages for. It may be an obstruction and not an unreasonable or unlawful obstruction, and our contention is, it is neither unreasonable or unlawful. 10

Mr. Avis: Because you say the Secretary of War has jurisdiction over it, that is the reason you say that.

The Court: "Because" don't cut any figure, as far as I am concerned.

Mr. Watkins: Let us put this in writing and have both of them sign it. 20

Mr. Gaskill: My suggestion would be—I stated it very clearly in the opening—to have your Honor run over the opening, because I have expressed myself there so fully that I could only go over the whole matter again to state it.

Mr. Avis: We suggest the question to be submitted, your Honor, be written out and signed by both of us. Of course, I am perfectly willing to do that. I did not understand that the question of unreasonableness was disputed by Mr. Gaskill at the present time with the exception that it could not be declared unreasonable until the War Department 30

had declared it unreasonable. If that is the question, I think it is perfectly fair to submit it to your Honor. If, as a matter of fact, that is agreed to, this delay to people navigating that stream, and he wants to still withhold the question of the reasonableness of the construction, then, of course, I raise the question of fact which somebody must decide.

Mr. Gaskill: Let me get at it again. The 18th  
10 Section of the statute, being an extract from the  
River and Harbor Act, states, "That whenever the  
Secretary of War shall have good reason to believe  
that any railroad or other bridge now constructed,  
or which may hereafter be constructed over any of  
the navigable waterways of the United States is an  
unreasonable obstruction to the free navigation of  
such waters on account of insufficient height, width  
of span, or otherwise, or where there is difficulty in  
20 passing the draw opening or the draw span of such  
bridge by rafts, steamboats, or other water craft, it  
shall be the duty of the said secretary, first giving  
the parties reasonable opportunity to be heard, to  
give notice to the persons or corporations owning  
or controlling such bridge so to alter the same as  
to render navigation through or under it reasonably  
free, easy and unobstructed; and in giving such  
notice, he shall specify the changes recommended by  
the Chief of Engineers that are required to be made,  
and shall prescribe in each case a reasonable time in  
30 which to make them." Now, then, that not having  
been done, the Secretary of War not having good reason  
to believe that this bridge was an unreasonable  
obstruction to navigation and not having given  
notice to the complainants and to the owner of the  
bridge to appear and not having decided that it  
was an unreasonable obstruction, and not having

given notice to the company to alter so that it would not be such obstruction, that no case has been presented here on the part of the plaintiff. It is not sufficient for him to state in his complaint or in his opening that there is a bridge there and that that bridge was an unlawful obstruction; he must prove it is an unreasonable obstruction by reason of the Secretary of War having so declared. Now, that is practically the situation as counsel has stated it.

10

The Court: Then your defence is wholly —

Mr. Gaskill: Statutory.

The Court: That as a condition precedent to the maintenance of an action of this sort the Secretary of War must act?

Mr. Gaskill: Yes, sir.

20

The Court: Within the provisions of the statute which you read?

Mr. Gaskill: Yes, sir.

The Court: But I do not understand you question the plaintiffs' contention that this bridge across this navigable stream did obstruct navigation.

Mr. Gaskill: No, we don't question that; in other words, I agree with counsel in that this is a navigable river and that this bridge was an obstruction to some extent to navigation.

30

The Court: And it did obstruct these plaintiffs in the operation of their dredge so that they sustained damage to the extent of \$600?

Mr. Gaskill: Yes, sir.

The Court: All right. I think we understand the situation. Now, what do you want me to do, gentlemen?

Mr. Gaskill: Will you dispose of it this afternoon or examine the statute?

10 The Court: I will dispose of it now, if you have no objection.

Mr. Gaskill: No, that is entirely satisfactory.

The Court: Gentlemen of the jury, you are required to return a verdict for the plaintiffs for \$600.

20 Mr. Gaskill: Will your Honor give me an exception to your charge and to the direction to find a verdict for the plaintiffs?

The Court: Yes.

